



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

October 2, 1997

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Frank M. McCord, Treasurer
Friends for Jack Metcalf
5023 Claremont Way
Everett, WA 98203

RE: MUR 4546
Friends for Jack Metcalf Committee

Dear Mr. McCord:

On November 2, 1996, the Federal Election Commission notified Friends for Jack Metcalf ("Committee") and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to you at that time.

Upon further review of the allegations contained in the complaint, the Commission, on September 30, 1997, found that there is reason to believe the Committee and you, as treasurer, violated 2 U.S.C. § 434(b)(3)(A), a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. *Statements should be submitted under oath.* All responses to the enclosed Order to Answer Questions and Subpoena to Produce Documents must be submitted to the General Counsel's Office within 30 days of your receipt of this letter. Any additional materials or statements you wish to submit should accompany the response to the order and subpoena. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

You may consult with an attorney and have an attorney assist you in the preparation of your responses to this order and subpoena. If you intend to be represented by counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notification or other communications from the Commission.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in

settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Tara Meeker, the attorney assigned to this matter, at (202) 219-3690.

Sincerely,


John Warren McGarry
Chairman

Enclosures

Order and Subpoena
Designation of Counsel Form
Factual and Legal Analysis

cc: Hon. Jack Metcalf

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

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MUR 4546

SUBPOENA

TO: Frank M. McCord
Friends for Jack Metcalf Committee
5023 Claremont Way
Everett, WA 98203

Pursuant to 2 U.S.C. § 437d(a)(1) and (3), and in furtherance of its investigation in the above-captioned matter, the Federal Election Commission hereby orders you to submit answers in writing and under oath to the questions attached to this Order within 30 days of your receipt of this request.

In addition, the Commission subpoenas you to produce the documents specified in the attachment to this subpoena, in their entirety, for inspection and copying at the Office of the General Counsel, Federal Election Commission, Room 659, 999 E Street, N.W., Washington, D.C. 20463, on or before the same deadline.

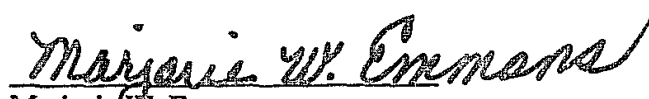
Clear and legible copies or duplicates of the documents which, where applicable, show both sides of the documents may be submitted in lieu of the production of the originals.

WHEREFORE, the Chairman of the Federal Election Commission has hereunto set his
hand in Washington, D.C. on this *10th* day of *October* 1997.

For the Commission,


Jean Warren McGarry
Chairman

ATTEST:


Marjorie W. Emmons
Secretary to the Commission

Attachments

Instructions/Definitions

Interrogatories and Request for Documents

99-04-29-40-66

INSTRUCTIONS

In answering these interrogatories and request for production of documents, furnish all documents and other information, however obtained, including hearsay, that is in possession of, known by or otherwise available to you, including documents and information appearing in your records.

Each answer is to be given separately and independently, and unless specifically stated in the particular discovery request, no answer shall be given solely by reference either to another answer or to an exhibit attached to your response.

The response to each interrogatory propounded herein shall set forth separately the identification of each person capable of furnishing testimony concerning the response given, denoting separately those individuals who provided informational, documentary or other input, and those who assisted in drafting the interrogatory response.

If you cannot answer the following interrogatories in full after exercising due diligence to secure the full information to do so, answer to the extent possible and indicate your inability to answer the remainder, stating whatever information or knowledge you have concerning the unanswered portion and detailing what you did in attempting to secure the unknown information.

Should you claim a privilege with respect to any documents, communications, or other items about which information is requested by any of the following interrogatories and requests for production of documents, describe such items in sufficient detail to provide justification for the claim. Each claim of privilege must specify in detail all the grounds on which it rests.

Unless otherwise indicated, the discovery request shall refer to the time period from January 1, 1996 to December 31, 1996.

The following interrogatories and requests for production of documents are continuing in nature so as to require you to file supplementary responses or amendments during the course of this investigation if you obtain further or different information prior to or during the pendency of this matter. Include in any supplemental answers the date upon which and the manner in which such further or different information came to your attention.

DEFINITIONS

For the purpose of these discovery requests, including the instructions thereto, the terms listed below are defined as follows:

"You" shall mean the named respondent in this action to whom these discovery requests are addressed, including all officers, employees, agents or attorneys thereof.

"Persons" shall be deemed to include both singular and plural, and shall mean any natural person, partnership, committee, association, corporation, or any other type of organization or entity.

"Document" shall mean the original and all non-identical copies, including drafts, of all papers and records of every type in your possession, custody, or control, or known by you to exist. The term document includes, but is not limited to books, letters, contracts, notes, diaries, log sheets, records of telephone communications, transcripts, vouchers, accounting statements, ledgers, checks, money orders or other commercial paper, telegrams, telexes, pamphlets, circulars, leaflets, reports, memoranda, correspondence, surveys, tabulations, audio and video recordings, drawings, photographs, graphs, charts, diagrams, lists, computer print-outs, and all other writings and other data compilations from which information can be obtained.

"Identify" with respect to a document shall mean state the nature or type of document (e.g., letter, memorandum), the date, if any, appearing thereon, the date on which the document was prepared, the title of the document, the general subject matter of the document, the location of the document, the number of pages comprising the document.

"Identify" with respect to a person shall mean state the full name, the most recent business and residence addresses and the telephone numbers, the present occupation or position of such person, the nature of the connection or association that person has to any party in this proceeding. If the person to be identified is not a natural person, provide the legal and trade names, the address and telephone number, and the full names of both the chief executive officer and the agent designated to receive service of process for such person.

"And" as well as "or" shall be construed disjunctively or conjunctively as necessary to bring within the scope of these interrogatories and request for the production of documents any documents and materials which may otherwise be construed to be out of their scope.

INTERROGATORIES AND REQUEST FOR DOCUMENTS

1. Provide all documents in your possession describing or relating to all written solicitations for the 1995-1996 election cycle, including, but not limited to, copies of each such solicitation.
2. For the time period identified in the instructions, describe the process or processes used to obtain missing employer and occupation information from contributors who gave over \$200 annually. In addition, for each process described, list and identify:
 - a. each person who participated in the process, including the person or persons responsible for overseeing the process,
 - b. the time period during which each process was used,
 - c. what information was obtained,
 - d. what follow up, if any, was performed based on information received; including, but not limited to, the filing of amendments to reports.
3. Provide all documents in your possession describing or relating to any process or processes used to obtain missing employer and occupation information.
4. To the extent not previously given, provide:
 - a. all incoming and outgoing documents relating to attempts to obtain missing employer and occupation information,
 - b. documentation of oral contacts with contributors in an attempt to obtain missing employer and occupation information.
5. List each contributor who was requested to provide occupation and/or employer information that was not provided with the contribution. For each contributor listed, include;
 - a. the dates this information was requested,
 - b. by what method the information was requested,
 - c. the name of the individual who contacted these contributors,
 - d. whether or not any response was received and on what date,

e. what information was contained in that response.

6. State whether amendments were filed to the April 1996 Quarterly Report to add additional employer and/or contributor information. If yes, please state when the amendment or amendments were filed and provide a copy of each amendment. If no, please explain.

7. State whether amendments were filed to the July 1996 Quarterly Report to add additional employer and/or contributor information. If yes, please state when the amendment or amendments were filed and provide a copy of each amendment. If no, please explain.

8. State whether amendments were filed to the October 1996 Quarterly Report to add additional employer and/or contributor information. If yes, please state when the amendment or amendments were filed and provide a copy of each amendment. If no, please explain.

9. Identify each person who participated in the preparation, completion and filing of the 1996 Quarterly Reports for April, July, and October.

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Friends for Jack Metcalf Committee
and Frank M. McCord, as treasurer

MUR: 4546

This matter was generated by a complaint filed with the Federal Election Commission by Paul Berendt. See 2 U.S.C. § 437g(a)(1).

The Federal Election Campaign Act of 1971, as amended, ("Act" or "FECA"), requires that the treasurer of a political committee file periodic reports of receipts and disbursements.

2 U.S.C. § 434(a)(1). Under 2 U.S.C. § 434(b)(3)(A), each report must disclose the identification of each person making aggregate contributions to the reporting committee in excess of \$200 in the calendar year. The term "person" includes individuals.

2 U.S.C. § 431(11). In the case of an individual, identification is defined as the name, mailing address, and the occupation of such individual, as well as the name of his or her employer.

2 U.S.C. § 431(13)(A) and 11 C.F.R. § 100.12. The Supreme Court upheld this reporting requirement, first enacted in 1971, against a first amendment challenge in Buckley v. Valeo, 424 U.S. 1, 61-84 (1976).

The Act provides a "safe harbor" for political committees based on their efforts at compliance with the reporting regulations. When the treasurer of a political committee shows that "best efforts" have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with the Act. 2 U.S.C. § 432(i). The treasurer and the committee will

only be deemed to have exercised best efforts if all written solicitations for contributions include a clear request for the contributor's full name, mailing address, occupation and name of employer. 11 C.F.R. § 104.7(b)(1). The request and statement shall appear in a clear and conspicuous manner on any response material included in the solicitation. *Id.* The request and statement are not clear and conspicuous if they are in small type of comparison to the solicitation, or if the printing is difficult to read or if the placement is easily overlooked. *Id.* For each contribution received in excess of \$200 per year which lacks required contribution information, a committee demonstrates "best efforts" by: (1) making at least one follow-up, stand-alone request for missing information; (2) within thirty days of receipt of a contribution with incomplete contributor identification; (3) without also soliciting a contribution¹; and (4) reporting previously missing information in amendments to the reports.² 11 C.F.R.

§ 104.7(b)(2). In Republican National Committee, et al. v. FEC, Civil Action No. 94-5248 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit upheld the requirement for a stand-alone, follow-up request to obtain missing contributor information, although vacating the requirement for the mandatory language specified in 11 C.F.R.

§ 104.7(b)(1). However, the language requirement is not an issue in this MUR at this time.³

¹ If the request is written, it shall be accompanied by a pre-addressed return post card or envelope for the response material. The written or oral request shall not include any material on any other subject or additional solicitation, except that it may include language solely thanking the contributor for the contribution.

² 11 C.F.R. § 104.7(b)(4) requires that amendments be submitted either with: (1) the committee's next regularly scheduled report as an amended memo Schedule A; OR (2) as an amendment to the report originally disclosing the contribution, on or before its next regularly scheduled reporting date.

³ As of July 2, 1997, the Commission announces new "best efforts" final rules which change the mandatory statement previously required in 11 C.F.R. § 104.7(b)(1). The new regulation contains suggestions of statements for political committees to use, while allowing

The "best efforts" regulation provides an affirmative defense to the lack of compliance with the Act's disclosure requirements; it does not mandate any action by political committees and there is no penalty for violating it. Only committees that fail to comply with the reporting requirements would have occasion to invoke the "best efforts" standard. For such committees, the Commission's "best efforts" regulations specify the minimum a committee must do to show that it has used its best efforts to obtain and disclose the name, address, occupation, and employer of each of its donors who contributed more than \$200 annually.

Congress has long recognized that disclosure of contributor occupation and employer information is an integral part of the reporting requirement. The "best efforts" regulation has its origins in a statutory amendment to the Act after Buckley, which added the following sentence to the end of 2 U.S.C. § 434(b),

When committee treasurers and candidates show that best efforts have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

FECA Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 480 (1976 Leg. Hist. at 1132)

(emphasis added). Three years later, the "best efforts" statutory provision was recodified to its current form with only minor changes in the original language:

When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of title 26.

flexibility in wording. Both of these statements contain the words "best efforts" and continue to ask specifically for name, mailing address, occupation, and name of employer.

2 U.S.C. § 432(i) (emphasis added).⁴

Complainant states that Friends for Jack Metcalf and Frank M. McCord, as treasurer, violated the FECA by failing to disclose the employer name or occupation as required by law for over seventy percent of the contributors on the July 1996 Second Quarterly Report and the October 15, 1996 Third Quarterly Report. Complainant maintains that the Metcalf committee failed to amend these two reports to add missing employer/occupation information in the months following their filing, and to this date has still not disclosed the required information. According to complainant, "FEC rules are in place to prevent such flagrant and disturbing attempts to hide sources of contributions from voters." Complaint at 2.

The complaint also details a Metcalf fund-raiser with Speaker of the House Newt Gingrich on May 24, 1996, where over \$60,000 was raised for the Metcalf campaign. Complainant asserts that the Metcalf committee made no disclosure of the employer name or occupation for \$19,870 received within two days of the fund-raiser from 54 individual contributors. Of these 54 individuals, the employer name or occupation was furnished for only 14 of them, or 26 percent. "It then had almost two full months after Newt Gingrich's visit to track down the employer name or occupation for that huge influx of cash." Complaint at 1.

Friends for Jack Metcalf and Frank M. McCord, as treasurer, did not respond to the complaint.

There are 115 individual contributions totaling \$47, 398, on the Metcalf committee's July 1996 Second Quarterly Report.⁵ Of these 115 listings, 85 of them, contributions totaling

⁴ The only actual substantive change in the provision was the deletion of "candidates" as persons to whom the "best efforts" standard is directly applicable; the standard itself was untouched.

\$31,373, list the contributor's employer and occupation as unknown; resulting in a non-compliance rate of 74 percent.

The Metcalf committee's Third Quarterly Report also showed a high non-compliance rate. For the period ending September 30, 1996, "occupation unknown" was listed for 29 of the 42 individual contributors, resulting in a non-compliance rate of 69 percent.

The same situation occurred on the Metcalf committee's First Quarterly Report, dated April 15, 1996. There was a non-compliance rate of 63 percent. In that report, the Metcalf committee reported receiving an additional \$10,750 from eighteen out of thirty individuals without the disclosure of employer or occupation information required by the FECA. This information was again listed as unknown.

Adding the amounts together from all three 1996 Quarterly Reports, entries reflecting at least \$46,898 in contributions were in violation of the FECA reporting requirements. With consistent failure to disclose rates between 63 and 74 percent, it appears that the Metcalf committee, despite several notifications from RAD, failed to take seriously this aspect of the reporting requirement. There was not even an employer name or occupation listed for the committee's own treasurer.

With respect to the three reports at issue, the Metcalf committee did not respond to RAD's inquiries until five months after receiving its first RFAI from RAD on this issue and less than a month before the election. At that time, the committee provided RAD with a letter it claims to have sent to contributors with missing information. However, since this letter is dated

⁵ Of the 117 contributions, the Schedule A includes two entries which appear to be PACs rather than individuals: the Transportation Political Education League and Friends of John Boehner.

October 16, 1996, and since the Metcalf committee still has not amended any of its 1996 Quarterly Reports to include any newly received employer and occupation information, it raises a question whether the committee even sent the letter. The October letter was not sent within thirty days of the receipt of a contribution as required by 11 C.F.R. § 104.7(b)(2).

The Metcalf committee has made another submission to RAD, which was received on July 2, 1997. That letter was dated June 30, 1997, and described the process the Metcalf Committee had developed to meet the disclosure requirements. Included in that package was another copy of the October 16, 1996 letter. The implication of this submission to RAD appears to be at a minimum that no such process existed before October 16, 1996. The committee also recently amended its 1996 30 Day Post General and Year End Reports with respect to additional contributor information.

Accordingly, there is reason to believe that Friends for Jack Metcalf Committee and Frank M. McCord, as treasurer, violated 2 U.S.C. § 434(b)(3)(A) by failing to provide complete contributor information on either its April, July, or October 1996 Quarterly Reports and by failing to demonstrate "best efforts" under 11 C.F.R. § 104.7(b).